

EXHIBIT B

CIVIL NO. 03-00385 SOM-LEK

DEFENDANT'S EXHIBIT 231

IN EVIDENCE - FOR IDENTIFICATION

REC'D _____, 2006.

CLERK

Wayne Berry

v

Hawaiian Express Service

**Jeffrey H. Kinrich
Analysis Group, Inc.**

Summary of Opinions

- Mr. Ueno's inflated "reasonable license fee" contains factual and conceptual errors
- Fleming Hawaii has little or no profits to disgorge
 - Fleming Hawaii lost \$861,478
 - Fleming Hawaii reduced its losses post-infringement
 - FCS generated little or no cost savings for Fleming
- Mr. Berry's direct damages are no more than \$16,800

Mr. Ueno's "Reasonable License Fee" Per Container Calculation

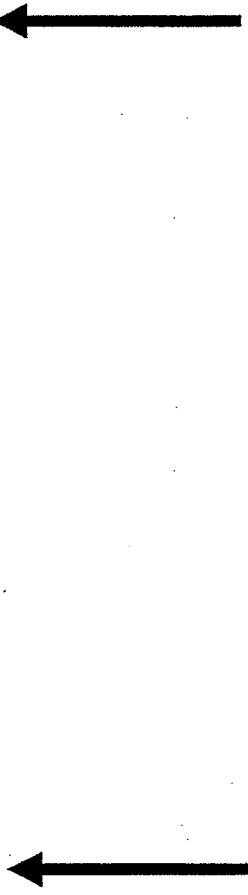
Mr. Ueno's "reasonable license fee" per container =

"Fleming Acknowledged /
Fee"

\$1,295,000

of Containers Processed
Between 10/9/99 and 1/10/00

731



Mr. Ueno misstates facts
in using this number

Mr. Ueno makes arbitrary
assumptions in coming
up with this number

Mr. Ueno's "Reasonable License Fee" Per Container Calculation

- Mr. Ueno bases his "reasonable license fee" per container on:
 - Fee allegedly paid by Fleming to license FCS software
 - Period of time that license fee allegedly covered

**BOTH OF THESE ITEMS
ARE BASED ON FAULTY
ASSUMPTIONS**

“Fleming Acknowledged Fee” Used by Mr. Ueno Has Nothing to Do with the FCS

- What does the \$1,295,000 fee used by Mr. Ueno represent?
 - Fleming forgave its uncollectible note against API
 - API forgave offsetting claims it had against Fleming
 - API could not pay the \$1,295,000 it owed Fleming
 - Value of the note less than \$1,295,000
 - Fleming purchased all of API's assets except for the FCS
 - Fleming received a free license from Mr. Berry for the FCS
 - Mr. Berry received no money from Fleming
 - Fleming never paid a license fee for the FCS

Mr. Ueno's Calculation of the Number of Containers Processed by Fleming is Arbitrary

- Why does Mr. Ueno use the time period of 10/9/99 – 1/10/00 in his “reasonable license fee” calculation?:
 - Assumes Fleming stops using the FCS by 1/10/00 but...
 - Several documents contradict assertion
 - Fleming had a free license to use the FCS
 - Extending time period would reduce the “reasonable license fee”
 - BUT: Fleming’s free license had no end date

Other Conceptual Problems with Mr. Ueno's "Reasonable License Fee" Calculation

- Mr. Ueno calculates the wrong license fee:
 - Calculated based on value of the entire FCS
 - Should only be related to the infringing portion
 - Fleming had free license to use the unaltered FCS
 - Logistics software not priced per container
 - Not the way logistics software is purchased
 - Mr. Berry's other logistics software not licensed in this way

Other Conceptual Problems with Mr. Ueno's "Reasonable License Fee" Calculation (Cont.)

- Mr. Ueno's results are unreasonable:
- Implies Fleming would pay approximately \$100,000 per week for the FCS
- Mr. Berry offered to sell entire FCS software for \$300,000
 - Fleming turned him down and received a free license
- Mr. Berry sold a license for superior FCS software to Y. Hata for \$150,000

Fleming Hawaii Lost Money During the Infringement Period

Fleming Hawaii Financial Performance
April 1, 2003 – June 8, 2003

| | |
|-----------------------------|--------------------------|
| Net Sales | \$54,435,793 |
| Gross Margin | 707,409 |
| Less: SG&A | <u>504,877</u> |
| Operating Income | 202,533 |
| Less: Other Expenses | <u>1,064,011</u> |
| Net Income | <u>-\$861,478</u> |

Fleming Hawaii Lost Money During the Infringement Period

Fleming Hawaii Financial Performance
April 1, 2003 – June 8, 2003

| | |
|---------------------------------|-------------------|
| Net Sales | \$54,435,793 |
| <i>Less: Cost of Goods Sold</i> | <u>53,728,383</u> |
| Gross Margin | 707,409 |
| <i>Less: SG&A</i> | <u>504,877</u> |
| Operating Income | 202,533 |
| <i>Less: Other Expenses</i> | <u>1,064,011</u> |
| Net Income | <u>-\$861,478</u> |

Fleming Hawaii's Performance Improved After Use of FCS Ceased

Comparison of Fleming Financial Performance

| | Infringing <u>4/1/03 - 6/8/03</u> | Non-Infringing <u>6/9/03 - 8/23/03</u> |
|--------------|--------------------------------------|---|
| Net Loss | \$861,478 | \$343,196 |
| # of Days | 69 | 76 |
| Loss per Day | \$12,485 | \$4,516 |

Even if Fleming Did Have Profits, They are not Attributable to the FCS Software

- Cost savings generated through know-how of the staff
 - Fleming still able to save on costs without using the FCS software

Fleming's Costs Increased Slightly After Abandoning the FCS Software

- Fleming hired a clerk @ \$25,000/year total cost
 - Infringing period < 1/5 of a year
 - Total cost savings to Fleming < \$5,000

Actual Damages Suffered by Mr. Berry

- How was Berry damaged?
- "I knew that Fleming would have to come to me to make changes to my work." (Declaration of Wayne Berry, 9/13/05, p. 8)
- By changing FCS, Fleming denied Mr. Berry compensation
- Mr. Berry's damages equal his fee to modify FCS

Actual Damages Suffered by Mr. Berry

Total Hours Required to Make
Modifications

X

Mr. Berry's Hourly Rate

=

Total Cost to Modify the FCS software

Actual Damages Suffered by Mr. Berry

Estimate of Total Hours Required to Make Modifications

| | Number of Hours | |
|--|-----------------|------|
| | Low | High |
| Removal of Extraneous Tables | 32 | 40 |
| Addition of Vendor Defaults | 32 | 40 |
| Standardization of Forms | 32 | 32 |
| Alteration of Accounts Receivable Payment Form | 24 | 24 |
| Modification of Tab Orders | 8 | 16 |
| <i>Ad Hoc</i> Changes | 8 | 16 |
| Total Hours Needed | 136 | 168 |

Actual Damages Suffered by Mr. Berry

- Determination of Mr. Berry's hourly rate
 - Mr. Berry told Y. Hata he charges \$100/hr.
 - Fleming received \$90/hr. quote from application developer
- \$100/hr. reasonable rate for Mr. Berry to modify FCS

Actual Damages Suffered by Mr. Berry

Total Hours Required to Make
Modifications

| <u>Low</u> | <u>High</u> |
|------------|-------------|
| 136 | 168 |

X

| | | |
|---------------------------------------|----------|----------|
| Mr. Berry's Hourly Rate | \$100 | \$100 |
| | = | |
| Total Cost to Modify the FCS software | \$13,600 | \$16,800 |

Summary

- Fleming Hawaii's profits attributable to infringing use of the FCS are between \$0 and \$5,000
- Mr. Berry's direct damages are between \$13,600 and \$16,800